

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A73 439 853 - Seattle

Date:

In re: CHON HANG

JUN 19 1997

INDEX

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Antonio Salazar, Esquire
900 Fourth Avenue, Suite 1500
Seattle, Washington 98164

CHARGE:

Order: Sec. 241(a)(1)(C)(i), I&N Act [8 U.S.C. § 1251(a)(1)(C)(i)] -
Nonimmigrant - failed to comply with conditions of status

APPLICATION: Reopening

The respondent's appeal from an Immigration Judge's decision dated October 22, 1996, denying his motion to reopen deportation proceedings conducted in absentia, will be sustained.

The respondent is a 49-year-old male, native and citizen of Cambodia, who entered the United States on April 3, 1993. On March 5, 1995, the Immigration and Naturalization Service personally served the respondent with an Order to Show Cause (OSC), alleging that he is subject to deportation for having remained in the United States for a longer period than permitted. On March 24, 1995, the Immigration Court issued the respondent a notice indicating that his deportation hearing was scheduled for July 13, 1995.

The respondent failed to appear at his hearing on July 13, 1995. Because no reason was evident for the respondent's absence, the Immigration Judge conducted the hearing in absentia pursuant to section 242B of the Immigration and Nationality Act, 8 U.S.C. § 1252b, and ordered the respondent deported from the United States.

On September 30, 1996, the respondent, through counsel, filed a motion to reopen his deportation proceedings. See generally Matter of Gonzalez-Lopez, 20 I&N Dec. 644 (BIA 1993). The respondent argued that he failed to appear for his hearing because he did not speak English. His brother was with him at the time the OSC was issued but his brother also has difficulty understanding English. The respondent claimed that his brother failed to inform him that a hearing had been scheduled before an Immigration Judge.

The Immigration Judge denied the motion to reopen indicating that the Immigration Court is not required to send out hearing notices in every language that the alien is likely to speak so as to ensure he receives a notice in a language he understands. In addition, the Immigration Judge stated that the respondent had failed to comply with his obligation to provide the Immigration Court with an address where he could receive his mail. On appeal, the respondent argues that the Immigration Judge erred in denying his motion to reopen because it was clear that he had not received notice of the hearing, that he did not speak English, and that these factors established exceptional circumstances.

Service of an Order to Show Cause may be accomplished either by personal service or by routine service. 8 C.F.R. § 242.1(c). When personal service of an OSC is made by an immigration officer, the Service imposes upon itself the requirement that the OSC be explained to the subject of the order. See Matter of Hernandez, Interim Decision 3265 (BIA 1996); 8 C.F.R. § 242.1(c). The OSC informs the respondent that he is in deportation proceedings, and contains information about the respondent's requirement to report his change of address and the consequences if he fails to appear at a deportation hearing.

The respondent argues that he does not speak English and that although his brother was present when the OSC was served, the brother also has limited knowledge of the English language. In this type of situation, the Service is required to explain the contents of the OSC to the respondent in a language he could understand. The OSC clearly indicates that there was no translator available at the time and that the OSC was not read to the respondent in a language he understands. The Service violated the provisions of 8 C.F.R. § 242.1(c) in not providing an adequate explanation of the OSC.

This Board has held that the violation of a regulatory requirement invalidates a proceeding only where the regulation provides a benefit to the alien and the violation prejudiced the interest of the alien which was to be protected by the regulation. Matter of Hernandez, *supra*; Matter of Garcia-Flores, 17 I&N Dec. 325 (BIA 1980); see also United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979). The explanation requirement of 8 C.F.R. § 242.1(c) clearly does provide a benefit to the alien. Matter of Hernandez, *supra*.

We also held in Matter of Hernandez, *supra*, that the violation of this regulation, however, does not necessarily result in prejudice to the alien. This is so because (1) there is a thorough explanation of the meaning and significance of the Order to Show Cause in the form itself; (2) the Immigration Judge at the hearing is required to explain the allegations and charges in the OSC in nontechnical language, under 8 C.F.R. § 242.16(a); and (3) an explanation of the contents of the OSC is only required in certain situations. Nevertheless, we find that the respondent in the present case may not have been protected by these safeguards surrounding 8 C.F.R. § 242.1(c).

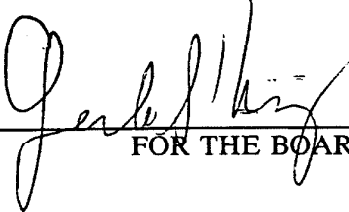
In the present case, although there is an explanation of the contents of the OSC in the form itself, the respondent has stated that he does not speak English, that he only speaks Cambodian, and that there was no way of him knowing that he was to appear before an Immigration Judge. Subsequently, because the respondent did not appear before the Immigration Judge, he did not

benefit from the "nontechnical" explanation of the contents of the OSC. Lastly, an immigration officer served the respondent with an Order to Show Cause, knowing that he does not speak English and not providing him adequate translation of the document. The immigration officer erred in not providing an official translator and in relying on the translation from the respondent's brother.

We have no way of knowing what the brother understood and what he relayed to the respondent about the OSC. - Thus, we find the respondent could have been prejudiced by the Service's violation of the provisions of 8 C.F.R. § 242.1(c) because he may not have been properly served with the OSC and therefore should not have been ordered deported in absentia. A hearing should first be conducted to find out what the brother told the respondent when the OSC was served.

Consequently, we find that a remand is necessary so that the alien can have the opportunity to show that he was prejudiced by the violation of 8 C.F.R. § 242.1(c).

ORDER: The decision of the Immigration Judge is vacated, and the record is remanded to the Immigration Court for action in accordance with the foregoing decision.



FOR THE BOARD